

FILED BY CLERK

JAN 18 2008

COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

In re the Marriage of:	)	2 CA-CV 2007-0056
	)	DEPARTMENT A
CRAIG MORTON,	)	
	)	<u>MEMORANDUM DECISION</u>
Petitioner/Appellant,	)	Not for Publication
	)	Rule 28, Rules of Civil
and	)	Appellate Procedure
	)	
SHERRI MORTON,	)	
	)	
Respondent/Appellee.	)	
_____	)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. D-2004-4465

Honorable Kyle A. Bryson, Judge Pro Tempore

AFFIRMED

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H O W A R D, Presiding Judge.

¶1 Appellant Craig Morton appeals from a decree dissolving his marriage to appellee Sherri Morton. He argues the trial court erred by concluding that Craig and Sherri had entered into a binding agreement following mediation and finding that the agreement was not unfair.<sup>1</sup> Because Craig has failed to provide this court with a transcript of the trial, we cannot review most of the issues he raises and have found no error in the others. Therefore, we affirm.

### **Background**

¶2 We view the evidence in the light most favorable to sustaining the trial court's factual findings. *See Gutierrez v. Gutierrez*, 193 Ariz. 343, ¶ 5, 972 P.2d 676, 679 (App. 1998). Because Craig has failed to provide this court with a transcript, we adopt these facts from the trial court's ruling and from other documents in the record. Craig, a custom home builder, and Sherri, a realtor, were married in 1988. During the marriage, they began to build a house together. While the house was under construction, Craig filed a petition to dissolve the marriage.

¶3 In October 2005, before trial, Craig and Sherri entered private mediation with attorney Alyce Pennington serving as mediator. After the mediation, Pennington prepared a memorandum ("mediation memorandum") listing what she believed were the terms of an

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<sup>1</sup>In his statement of issues presented for review, Craig lists a third issue: whether the court erred by imposing a "penalty provision" in the agreement. But he does not present this as a separate issue in the body of his brief and instead presents issues regarding the "penalty provision" within his argument regarding the fairness of the agreement. We likewise do not address it as a separate issue.

agreement reached at the mediation. The mediation memorandum provided, in part, that Craig would complete construction of the house, that it would be sold, and that the net proceeds from the sale would be divided unequally, with sixty-two percent going to Sherri and thirty-eight percent to Craig, after Sherri received a payment of \$35,000. Additionally, it included a “penalty provision” stating that Craig’s percentage of the distribution would drop by one percent for each week after November 24, 2005, that the house was not complete.

¶4 In a letter to Pennington dated several days after the mediation, Craig’s counsel requested clarification of whether the agreement to unequal distribution of proceeds from the sale of the house had obviated the need for the \$35,000 payment. He also requested an exception to the penalty provision for things beyond Craig’s control. Then, in correspondence to Sherri’s counsel sent by facsimile and dated over a week later, Craig’s counsel wrote, “Craig will (reluctantly) agree to the settlement proposal as written by Alyce Pennington with respect to the payment to Sherri of the \$35,000 from the house proceeds.” After that, the parties apparently attempted to draft a marital settlement agreement that both parties would agree to, but were unsuccessful.

¶5 Sherri then filed a motion to enforce the terms of the mediation memorandum. In his response, Craig argued the mediation memorandum was not binding under Rule 69, Ariz. R. Fam. Law P., and was inequitable. After a hearing, the trial court ruled that, “based upon the record presented,” it could not find that the mediation memorandum was “an

accurate memorialization of what occurred in private mediation.” It therefore denied the motion. The parties then entered a settlement agreement, but preserved issues involving the proceeds of the sale of the house for trial.

¶6 After a bench trial, the trial court ruled that the mediation memorandum had been binding, based on Craig’s testimony at trial that he had agreed to its terms. The court also ruled that the terms of the mediation memorandum were not unfair. Based on the mediation memorandum, including the penalty provision, the court awarded eighty-one percent of the proceeds from the sale of the house to Sherri and nineteen percent of the proceeds to Craig.

### **Binding Agreement**

¶7 Craig first argues the trial court erred by finding the agreement complied with Rule 69, Ariz. R. Fam. Law P., and was binding. We will uphold the court’s factual findings unless they are clearly erroneous. *See Gerow v. Covill*, 192 Ariz. 9, ¶ 24, 960 P.2d 55, 61 (App. 1998). Factual findings are clearly erroneous if “they are unsupported by substantial evidence.” *Felder v. Physiotherapy Assocs.*, 215 Ariz. 154, ¶ 72, 158 P.3d 877, 891 (App. 2007). But we are not bound by the court’s legal conclusions. *See Muchesko v. Muchesko*, 191 Ariz. 265, 268, 955 P.2d 21, 24 (App. 1997). Craig’s argument involves, in part, the interpretation of court rules, which we review de novo. *See Allstate Indem. Co. v. Ridgely*, 214 Ariz. 440, ¶ 8, 153 P.3d 1069, 1071 (App. 2007).

¶8 Rule 69 states: “Agreements between the parties shall be binding if they are in writing or if the agreements are made or confirmed on the record before a judge, commissioner, judge pro tempore, court reporter, or other person authorized by local rule or Administrative Order to accept such agreements.” The committee comment to Rule 69 provides that the rule is based on Rule 80(d), Ariz. R. Civ. P. That rule provides: “No agreement or consent between parties . . . in any matter is binding if disputed, unless it is in writing, or made orally in open court, and entered in the minutes.” Ariz. R. Civ. P. 80(d). This court has held that Rule 80(d) applies to settlement agreements. *Canyon Contracting Co. v. Tohono O’Odham Hous. Auth.*, 172 Ariz. 389, 391, 837 P.2d 750, 752 (App. 1992).

¶9 Craig contends that the mediation memorandum was merely Pennington’s expression of what she believed the agreement to be and that Craig did not assent to its terms. The trial court found, however, based on Craig’s testimony at trial, that Craig had agreed to the terms of the mediation memorandum. Craig has included what appear to be portions of the trial transcript as appendices to his opening brief, but the transcript is not part of the record on appeal. Craig was responsible for ensuring that the transcript was made part of the record. *See* Ariz. R. Civ. App. P. 11(b); *State ex rel. Dep’t of Econ. Sec. v. Burton*, 205 Ariz. 27, ¶ 16, 66 P.3d 70, 73 (App. 2003). Because the transcript is not part of the record, we will not consider the portions attached to Craig’s brief. *See In re 6757 S. Burcham Ave.*, 204 Ariz. 401, ¶¶ 11-12, 64 P.3d 843, 846-47 (App. 2003) (refusing to consider transcript excerpt attached to opening brief when transcript not part of record on

appeal). And we presume the missing transcript supports the court’s ruling. *See Baker v. Baker*, 183 Ariz. 70, 73, 900 P.2d 764, 767 (App. 1995).

¶10 Thus, we presume Craig “confirmed [the agreement] on the record before a . . . judge pro tempore.” Ariz. R. Fam. Law P. 69. Therefore, the trial court did not err or abuse its discretion in finding that the mediation memorandum constituted an agreement that complied with Rule 69 and was binding.

¶11 Craig also contends the mediation memorandum did not comply with the Rule 69 requirement of a “writing” because Pennington, who was not acting as a judge pro tempore, had no authority to bind the parties. But because we presume Craig confirmed on the record before a judge pro tempore at trial that he had agreed to the terms of the mediation memorandum, we need not address Pennington’s authority to bind the parties.

¶12 Craig next argues that the provision in the mediation memorandum calling for unequal division of the proceeds of the sale of the house was ambiguous and the parties had different interpretations of the provision.<sup>2</sup> But, as noted above, in the absence of a trial transcript, we presume the testimony at trial supports the trial court’s findings. *See Baker*, 183 Ariz. at 73, 900 P.2d at 767.

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<sup>2</sup>In his reply brief, Craig also argues this difference in interpretation constituted a mutual mistake, rendering the agreement unenforceable. But Craig waived this argument by raising it for the first time in his reply brief. *See In re Marriage of Pownall*, 197 Ariz. 577, n.5, 5 P.3d 911, 917 n.5 (App. 2000).

¶13 Craig last argues that the mediation memorandum was not binding because it did not contain the acknowledgment required by Rule 67(B)(7), Ariz. R. Fam. Law P. That rule by its terms applies “[i]f the court refers or orders a case to mediation.” *Id.* In this case, the parties agreed to mediation without court involvement. Thus, Rule 67(B)(7) does not apply.

### **Fairness**

¶14 Craig argues that, even if the trial court did not err in finding the mediation memorandum binding, it did err in finding it was not unfair. We review the trial court’s distribution of property for an abuse of discretion. *See Sharp v. Sharp*, 179 Ariz. 205, 209, 877 P.2d 304, 308 (App. 1994). “An abuse of discretion exists when the record, viewed in the light most favorable to upholding the trial court’s decision, is devoid of competent evidence to support the decision.” *Burton*, 205 Ariz. 27, ¶ 14, 66 P.3d at 73.

¶15 If a party challenges the fairness of an agreement, the trial court must find it to be equitable before accepting it. *See* A.R.S. § 25-317(B); *Sharp*, 179 Ariz. at 210-11, 877 P.2d at 309-10. In doing so, the court “must consider ‘all the evidence before it relating to the agreement, together with all other evidence concerning the relation of the parties at the time of trial, their ages, financial conditions, opportunities, and the contributions of each to the joint estate.’” *Sharp*, 179 Ariz. at 210, 877 P.2d at 309, *quoting Wick v. Wick*, 107 Ariz. 382, 385, 489 P.2d 19, 22 (1971). “[T]he court need also determine what assets

comprise the community estate and whether the party challenging the agreement had full knowledge of the property involved.” *Id.*

¶16 Craig contends there was “absolutely no review” of the fairness of the mediation memorandum. He is incorrect. The trial court’s ruling indicates it had reviewed the mediation memorandum for fairness and concluded it was not unfair.

¶17 Craig also contends the court abused its discretion in finding the agreement was not unfair because there was “no compelling reason to award [Sherri] the vast majority of the parties’ community assets.” But, again, we presume the trial testimony supports the court’s conclusion that the terms of the agreement were not unfair. *See Baker*, 183 Ariz. at 73, 900 P.2d at 767.<sup>3</sup>

### **Attorney Fees**

¶18 Sherri requests an award of attorney fees on appeal, arguing Craig’s position is unreasonable under A.R.S. § 25-324 and the appeal is frivolous under Rule 25, Ariz. R. Civ. App. P. But the trial court made no findings regarding the relative financial positions of the parties and, finding that neither party had taken an unreasonable or dilatory position,

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<sup>3</sup>Craig also argues that he believed the penalty provision would not be enforced, relying on the trial court’s initial decision that the mediation memorandum was not binding; that Craig and Sherri later modified the terms of the mediation memorandum; and that the trial court abused its discretion in enforcing the penalty provision because construction delays could be attributed to Sherri as well as Craig. Craig did not raise these issues in the trial court. Accordingly, these issues are waived, and we do not address them. *See Orfaly v. Tucson Symphony Soc’y*, 209 Ariz. 260, ¶ 15, 99 P.3d 1030, 1035 (App. 2004) (arguments not adequately presented in trial court are waived).

ordered each party to pay its own attorney fees. *See Gerow*, 192 Ariz. 9, ¶ 46, 960 P.2d at 65 (“Attorneys’ fee awards under [§ 25-324] are based on the financial positions of the parties.”). We have no basis to determine the financial positions of the parties and do not find that Craig has taken an unreasonable position on appeal. And, notwithstanding Craig’s failure to ensure that the trial transcript was made part of the record, we do not find this appeal frivolous. Accordingly, in our discretion, we decline Sherri’s request.

### **Conclusion**

¶19 For the foregoing reasons, we affirm.

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JOSEPH W. HOWARD, Presiding Judge

CONCURRING:

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JOHN PELANDER, Chief Judge

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J. WILLIAM BRAMMER, JR., Judge